

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 34561/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED: YES

Date: 6 October 2023

In the matter between:

M[...]: P[...] S[...]

PLAINTIFF

And

M[...]: R[...] V[...]

DEFENDANT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed divorce action wherein, on the papers, both parties wanted a divorce and the contentious issue was the proprietary consequences of the marriage.

[2] The Plaintiff instituted the divorce proceedings¹ claiming a decree of divorce and a division of the joint estate as well as 50 [fifty] percent of the pension interest of the Defendant.

[3] The Defendant on her part filed a counterclaim and claimed a decree of divorce and forfeiture of the benefits of the marriage in community of property. The plaintiff was represented by Mr C.L. Mabasa and the defendant by Mr N.T. Mogapi and V.O.M Seloane.

[4] The Plaintiff pleaded that the parties were married in terms of customary law on 13 July 1993² which is not denied by the Defendant. This matter will be dealt with further in this judgment because the documentation and testimony appeared to differ and it is accordingly incumbent on the Court to make a finding with regard thereto insofar as it is necessary to determine the proprietary consequences of the marriage.

TESTIMONY BY PLAINTIFF AND WITNESSES

[5] The Plaintiff testified and confirmed that he was married to the Defendant in accordance with customary law as well as that he had fathered three children with the Defendant. At the time of the hearing, all the children had reached the age of majority.

[6] The Plaintiff testified that he the Defendant in 1992 and married her in 1993. He testified further that the civil marriage was dissolved in 2005 in the Central Divorce Court³.

[7] The Plaintiff testified that he wanted to marry a second wife and the defendant, the first wife, agreed thereto. He stated that he paid lobola for his second wife in 2002 and this marriage was celebrated in the church. He was then asked as to what happened to his civil marriage and he said that he consulted Attorneys and he was

¹ Caselines: Section A: page 11

² Caselines: Section N: page 308

³ Caselines: Section D: pages 90-93

advised to divorce the defendant. The Plaintiff explained that his first marriage, in his words, 'was put on hold'; this meant he would temporarily divorce the defendant in order to marry his second wife.

[8] The Plaintiff indicated that his Attorneys told him that he needed the consent of the defendant to marry his second wife which he obtained and this took place at the Office's of his Attorneys. The Plaintiff testified that the civil marriage does not exist and the date contained on the customary marriage certificate obtained from the Department of Home Affairs is incorrect. In his view, the marriage certificate should have reflected the date after the dissolution of the civil marriage in 2005.

[9] At the time of the hearing, the Plaintiff testified that he had four wives which included the defendant. He stated that he married:

9.1. Defendant;

9.2. P[...] M[...] M[...] in 2002;

9.3. V[...] M[...] L[...] in 2010;

9.4. M[...] K[...] in 2018.

[10] The Plaintiff testified that in respect of all three wives after the defendant, he had obtained the consent of the defendant.

[11] The Plaintiff confirmed that the marriage had irretrievably broken down. In this regard, he testified that the defendant disrespected him and his other wives. The defendant also instituted interdict proceedings against him wherein he has been interdicted, inter alia, from having access to the joint bank account. The defendant has also had him arrested at various points in time. He testified further that he also obtained a protection order against the defendant in 2021 which prevented the defendant from contacting him or coming to his residence.

[12] The Plaintiff testified that he contributed to the purchase of all the immovable properties as well as the motor vehicles.

[13] P[...] M[...], hereinafter referred to as P[...], was then called to testify on behalf of the plaintiff. P[...] confirmed the testimony of the plaintiff especially regarding the consent of the defendant to the marriage.

[14] M[...] K[...] was then called to testify on behalf of the plaintiff. She confirmed that the defendant had consented to the marriage between her and the plaintiff.

[15] The plaintiff closed his case after the testimony of M[...] K[...].

TESTIMONY BY THE DEFENDANT

[16] The defendant was then called to testify. The defendant testified that and confirmed that she entered into a civil marriage with the plaintiff in 1993 and this marriage was dissolved in 2005. The defendant furthermore confirmed that the reason for dissolving the civil marriage was for the plaintiff to marry P[...].

[17] The defendant further testified that the plaintiff used to assault her and that she had obtained a protection order against the plaintiff.

[18] The defendant confirmed that she obtained an interdict against the plaintiff preventing him having access to the bank accounts.

[19] Defendant confirmed that she did not consent to the marriage of plaintiff to the third and fourth wives although she purchased the dresses for the wedding.

[20] Defendant testified that she wanted the plaintiff to forfeit the benefits of the joint estate in relation to the immovable property, motor vehicles as well as her pension benefits.

ANALYSIS AND EVALUATION

[21] It can be accepted on the basis of the evidence placed before this Court that the marriage between the parties has broken down irretrievably and there is no possibility of a reconciliation. Whilst the defendant tried to indicate to the Court that she would take the plaintiff back as a husband, it is my view, that a Court may not and cannot force one party to remain married to his/her spouse in circumstances such as the present. To repeat, this Court is accordingly satisfied that the marriage has irretrievably broken down.

[22] At the outset, this Court needs to make a finding as to when the plaintiff and the defendant entered into a marriage relationship and the nature of such relationship.

[23] The marriage certificate⁴ which formed part of the documentation and referred to by the parties, records a date of the customary marriage as having been entered into on 13 July 1993. This, however, cannot be correct because as testified to by both parties, a civil marriage was entered into by the parties in 1993 and this marriage between the parties was dissolved in 2005.

[24] This Court finds that the parties' civil marriage was dissolved in 2005 but that the parties continued to live as husband and wife and at the time of the hearing they were still husband and wife in terms of customary law and the regime attached to such marriage is one of in community of property. None of the parties have shown or proven that a contract was concluded excluding certain property from the joint estate nor did they show or prove that an ante-nuptial contract was concluded⁵.

[25] In terms of Section 8(4) of The Recognition of Customary Marriages Act⁶, Court is vested with the same powers as in sections 7, 8, 9 and 10 of the Divorce Act⁷ and section 24(1) of the Matrimonial Property Act⁸.

⁴ supra

⁵ Section 10(2) of the Recognition of Customary Marriages Act 120 of 1998

⁶ 120 of 1998

⁷ 70 of 1979

[26] It has become trite that a party claiming forfeiture of benefits in divorce proceedings, must plead the necessary factors which is alleged to give rise to forfeiture of benefits and not testify about grounds for forfeiture which were not pleaded⁹.

[27] The defendant pleaded that she did not consent to the Plaintiff marrying his other wives, except the second wife. Evidence in relation to other factors amounting to misconduct, in my view, cannot be taken into account in determining whether the plaintiff has committed substantial misconduct. However, this does not dispose of the matter because this Court must still make a finding on whether the defendant consented to the marriage and further whether the conduct of not obtaining consent from the defendant amounts to substantial misconduct.

[28] The plaintiff testified that the defendant consented to the other marriages to V[...] and M[...] and that this consent was recorded in the register of the Church. The plaintiff, however, did not produce a copy of the register evidencing such written consent.

[29] In evaluating this evidence as to whether consent was provided, I can only rely on the *viva voce* evidence led by the parties and in so doing a credibility finding will have to be made. In my view, the testimony by P [...], V [...] and M [...] is not helpful in that they too recounted that written consent was provided by the defendant in the register but no proof of same was produced. I have taken note that the said witnesses remain married to the plaintiff or are in relationship with the plaintiff. In this regard, this Court must be cautious in accepting such evidence which favours that of the plaintiff.

[30] This Court is of the view, that a finding that consent from the defendant was provided cannot be made in favour of the plaintiff. I was impressed with the evidence

⁸ 88 of 1984

⁹ M v M 2023 SCA at para 25

of defendant on this aspect. The fact of the defendant buying the dresses for V[...] and M[...] is not proof that she consented to the marriage. Her explanation in this regard is that she was saving on the costs and did not want unreasonable amounts to be paid for the dresses. She testified that she paid R3000-00 for V[...]’s dress instead of the amount of R15 000-00 that V[...] was looking at. This evidence was solicited from the defendant by the legal representative of the plaintiff and thus can and is admitted.

[31] This Court has already indicated that the plaintiff and his witnesses were not able to produce documentary proof of consent, having testified that written consent had been provided.

[32] The fact of not giving consent to the marriages of the third and fourth wife does not end the enquiry as to whether the defendant has proven that she is entitled to an order for forfeiture of the benefits of the marriage. The defendant must also show that the plaintiff did not contribute to acquisition of the assets in the joint estate or show the contribution of the plaintiff was less than hers.

[33] In regard to this aspect of the evidence, this Court is not satisfied that the parties have shown what each of them contributed in relation to the immovable properties and the motor vehicles.

[34] It is clear that the defendant has a pension interest which forms part of the joint estate. The question that arises is whether the defendant on whom the onus rests, has proven that the plaintiff would be unduly benefited if half of her pension benefit is granted to the plaintiff. In respect of the pension benefit of the defendant, it is axiomatic in my view that the plaintiff was made no contribution with regards thereto.

[35] The defendant in my view has proven that the plaintiff has committed substantial misconduct in that he married V[...] and M[...] without her consent. The defendant has furthermore proven that the plaintiff will be unduly benefited if half of her pension interest or benefit is awarded to him. The same, however, cannot be said in respect of the rest of the joint estate. In this regard, having found that the

parties have been unable to show the contributions made in respect of the immovable properties and the motor vehicles, these assets must remain in the joint estate to be divided equally between the parties.

[36] In respect of the proprietary consequences of the marriage, I am of the view that partial forfeiture of the benefits of the marriage in community of property has been proven and that the rest of joint estate remains to be shared equally between the parties.

COSTS

[37] It is trite that a successful party is entitled to the costs of action unless shown otherwise. It is also trite that the Court has a discretion in the awarding of costs but that such discretion must be exercised judiciously.

[38] In this matter both parties have been successful in the sense that the plaintiff has succeeded in proving the irretrievable breakdown of the marriage and the defendant has proven the partial forfeiture of the benefits of the joint estate.

[39] Accordingly, it is my view that it is fair and reasonable that each party pay their own costs.

CONCLUSION

[40] In conclusion, I am of the view that on the totality of the evidence marriage between the parties has irretrievably broken down. The proprietary consequences of the marriage have been dealt with and each party should pay their own costs.

[38] Accordingly, the following Order shall issue:

- a). a decree of divorce;
- b). the plaintiff is to forfeit the benefits of his half share in the pension interest of the defendant with the Government Employees Pension Fund;

c). the *restant* of the joint estate is to be divided equally between the parties;

d). each party is to pay their own costs.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 October 2023.

Date of hearing:	18, 19 20 and 21 July 2022 20 and 22 September 2022
Date of HOA:	18 and 24 October 2022
Date of judgment:	6 October 2023

Appearances:

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